IN THE SUPREME COURT OF IOWA

NO. 15-0695
Polk County No. LACL124195

CHRISTOPHER GODFREY,

Plaintiff/Appellant,

v.

STATE OF IOWA, et al.,

Defendants/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY

HON. BRAD MCCALL
District Judge, Fifth Judicial District of Iowa

BRIEF OF AMICUS CURIAE IOWA COUNTY ATTORNEYS ASSOCIATION

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Statement of Identity of Amicus Curiae

The Iowa County Attorneys Association (ICAA) is a nonpartisan association of Iowa's county attorneys and their assistants. The county attorney is the chief law enforcement officer for his or her county. In addition, the county attorney is the principal legal advisor to other county elected officials and the county as a corporate entity. In this role the county attorney regularly gives legal advice regarding the employment relationship including the hiring, discipline, compensation, and discharge of county employees.

ICAA submits this brief to the Iowa Supreme Court as amicus curiae because this case presents the important question of whether a cause of action under the Iowa Constitution should be recognized for a due process violation contrary to Art. I, § 9 or an equal protection violation contrary to Art. I, § 6. The resolution of this question is of substantial interest to ICAA and all governmental employers.

Summary of the Argument

The Iowa Supreme Court should not recognize a cause of action under Art. I, § 9 of the Iowa Constitution for a due process violation which is based on the employment relationship of the plaintiff and specifically on a decision relating to that relationship which is directly authorized by state law. Such an action is not supported by the text or history of the constitution or the policy considerations supporting a *Bivens* claim under the U.S. Constitution. This Court should reserve for another day whether such a cause of action should be recognized outside of the facts presented by this case.

Similarly, the Iowa Supreme Court should not recognize a cause of action under Art. I, § 6 of the Iowa Constitution for an equal protection violation when the defendants are members of the executive branch of government. This provision prohibits the legislature from granting privileges or immunities on an unequal basis. It does not provide a means for the judicial branch to review the decision making of executive officers. Although other principles of law do provide

for a cause of action against executive branch officials for certain kinds of discriminatory treatment the Iowa Constitution does not.

Argument

I. This Court should not recognize a due process cause of action under the Iowa Constitution in the factual context of Godfrey's claim.

ICAA expects that the individual defendants and the State of Iowa will advance the argument, as they did in the district court, that former Iowa Workers' Compensation Commissioner Christopher Godfrey's due process claim under the Iowa Constitution must fail because the Iowa legislature has not enacted legislation to allow for such a claim. Before the district court the defendants prevailed on an argument that the Iowa Constitution is not self-executing and the commandment in Art. XII, § 1 that, "[t]he general assembly shall pass all laws necessary to carry this constitution into effect" means there is not an implied cause of action without such legislation. *See, Conklin v. State*, 863 N.W.2d 301 (Iowa Ct. App. 2015) (finding the constitution is not self-executing).

Even if this Court were to determine that enacting legislation was not required there are sound reasons to reject the asserted due process claim in this case. These reasons provide ample justification for leaving for another case a decision on whether the Iowa Constitution is self-executing to the extent that a due process cause of action should be recognized.

Preservation of error.

ICAA agrees that Godfrey has preserved error on a claim as to whether there is an implied cause of action under Art. I, § 9 of the Iowa Constitution.

Scope of Review.

The Iowa Supreme Court reviews constitutional claims de novo. *Hensler v. City of Davenport*, 790 N.W.2d 569, 578 (Iowa 2010).

A. A due process claim for deprivation of property requires that the asserted property interest be more than speculative or discretionary. Godfrey asserts a due process violation based upon a salary decision that the law empowered the governor to make. Has Godfrey established a valid due process claim?

Due process of law. This concept enjoys a long and distinguished pedigree. It entered our legal heritage 800 years ago in King John's recognition of the authority of Parliament to make laws which would bind the Crown. Among the many promises he made was that, "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, Ch. 39, in A.E. Dick Howard, *Magna Carta: Text and Commentary* 43 (1964). The phrase, "by the law of the land" was understood to mean, "by due proces (sic) of the common law." E. Coke, *The Second Part of the Institutes of the Laws of England* Vol 1. 45, 50 (1797).

Magna Carta was fundamental to establishing the principle of the rule of law, "[i]t maintained the principle that authority was subject to law…By granting or withholding legal process, the king was mediating justice itself." Robert M. Pallitto, *In the Shadow of the Great Charter: Common Law Constitutionalism and the Magna Carta* 5 (2015).

Blackstone described the "absolute rights of every Englishman" as the right to life, the right to personal liberty, and the right of personal property. William Blackstone, *Commentaries on the Laws of England in Four Books* 127-141 (Philadelphia: J.B. Lippincott Co., 1893). The recognition of the right to life, liberty, and property is found throughout state constitutions in the colonial period. For example, the Massachusetts Constitution stated:

> [N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

Mass. Const., pt. I, Art. XII (1780). Or consider the Maryland Constitution:

> That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.

Md. Const., Declaration of Rights, Art. XXI (1776). Due process provisions which protect, "life, liberty, or property" are found in all but three state constitutions (although with certain variations in phrasing and occasionally separated into criminal and civil protections). A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* Appx. N (1968).

The Framers understood fully the importance of this concept and placed it in the Fifth Amendment to the U.S. Constitution ("No person shall be … deprived of life, liberty, or property, without due process of law…"). The framers of the 1857 Iowa Constitution phrased the protection in essentially the same way as found in the federal constitution ("but no

person shall be deprived of life, liberty, or property, without due process of law.") Iowa Const., Art. I, § 9[1].

To understand the nature of Godfrey's claim of a constitutional cause of action we must therefore understand what the term "property" means in the formulation of this most basic of rights. In the context of the Fifth Amendment, the U.S. Supreme Court has held that the term must be defined in relation to some other principle of law:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). In *Roth* a college faculty member without tenure sued when his teaching contract was not renewed. *Id.* at 566. He claimed the failure to provide him reasons for the nonrenewal and an opportunity for a hearing on the validity of those

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[1] This provision remained unchanged from the original state constitution of 1847.

reasons constituted a denial of his property without due process of law. *Id.* at 568-69. The U.S. Supreme Court rejected this claim.

"[Roth]'s 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment." *Id.* at 578. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

Roth had accepted employment under a system where he understood that there was no legal entitlement to continued faculty employment. This meant he had no property interest in continued employment and therefore there was no basis for a due process violation. *Id.* at 578.

This Court has previously looked to federal cases interpreting the Due Process Clause of the Fifth Amendment when interpreting its Iowa counterpart. *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 340 (Iowa 2015). Godfrey's brief to this Court does not address, therefore provides no

argument in support of, whether the Iowa Due Process Clause should be interpreted differently than the Fifth Amendment[2]. This Court has previously cited *Roth* for the proposition that because a county assessor did not have a property right to be reappointed he could not assert a due process claim under either the U.S. or Iowa constitutions. *Bailiff v. Adams County Conf. Bd.*, 650 N.W.2d 621, 624-25 (Iowa 2002). *See also*, *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 837 (Iowa 2002) (due process claim under both U.S. and Iowa constitutions rejected when nursing home had no property interest in issuance of certificate of need to a competitor facility).

The logic of *Roth, Bailiff,* and *Greenwood Manor* are fatal to Godfrey's due process claim. In 2008 the General Assembly set the salary range for the workers' compensation commissioner at a minimum of $73,250 and a maximum of

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[2] Indeed, Godfrey asks this Court to interpret the Iowa Constitution identically to the U.S. Constitution in his request for this Court to follow *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Godfrey's *Bivens* argument will be addressed below.

$112,070. 2008 Iowa Acts Ch. 1191, §§ 14(1)(d) and (5). Godfrey was paid at the maximum rate until his salary was reduced to the minimum on or about July 11, 2011. (Third Amended Petition, ¶¶ 33, 34, 50.) This reduction in salary forms the essence of his due process claim.

But has Godfrey been denied something to which he had "a legitimate claim of entitlement?" Plainly the answer is, "no." In setting the salary range for workers' compensation commissioner the legislature gave the Governor the authority to select a salary as he saw fit:

> The following annual salary ranges are effective for the positions specified in this section for the fiscal year beginning July 1, 2008, and for subsequent fiscal years until otherwise provided by the general assembly. **The governor** or other person designated in the section of this division of this Act relating to appointed state officers **shall determine the salary to be paid to the person indicated at a rate within this salary range** from funds appropriated by the general assembly for that purpose.

2008 Iowa Acts Ch. 1191, § 14 (emphasis added).

The Governor was within his rights to set Godfrey's salary within the range provided for by law just as the president of the Wisconsin State University-Oshkosh was free to not reappoint Roth. There is no question that the Governor

took something away from Godfrey (over $38,000 per year) but he did it so "by the law of the land." That is to say the Governor operated under the legal framework that had been decided upon beforehand. This reduction in salary was not an exercise in the Crown's prerogative but an exercise in law. "Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (U.S. 2005) (rejecting property interest for due process claim in enforcement by law enforcement officials of a domestic abuse protective order).

It is this point which is of such interest to ICAA as amicus curiae. There are currently over 165,000 public employees in the State of Iowa. Iowa Public Employees Retirement System, *2014 Comprehensive Annual Financial Report*, 33. They work for 2,001 different employers. *Id.* The complexity and variety of the potential employment-related disputes which can arise with such numbers should be obvious. Godfrey's due process claim under the Iowa

Constitution, if allowed, would fundamentally transform the relationship between the public employer and employee.

The compensation to be paid an employee is plainly a key part of the employment relationship. Iowa governmental employers have broad authority to set compensation policies for their employees. Although this authority may be tempered in the context of collective bargaining under Iowa Code Chapter 20, the general rule is that compensation is set by the governing body of the political subdivision. Iowa Code § 331.324(1)(l) (county employees); Iowa Code § 372.13A (city employees); Iowa Code § 284.3A (school district employees).

If Godfrey prevails in having this cause of action recognized then each public employer in the State of Iowa faces a potentially agonizing choice in setting and reviewing the compensation of employees. Every performance review of an employee which results in the employee's compensation being lowered could form the basis of a lawsuit. The logic of Godfrey's theory would frankly mean that the failure to grant a merit raise or performance bonus could also be actionable.

Such a thing would stretch the word "property" beyond any intelligible meaning.

Godfrey may well respond, "I have not had my trial yet, I just want the cause of action recognized." This is a fair point, but not decisive. He makes his claim in a specific context: the Governor reduced his salary within the discretion given to him by law. Suppose this Court finds that a cause of action exists under the Iowa Constitution. The day after that decision is announced every governmental employer in the State of Iowa faces the difficult question of whether it can be sued for decisions regarding employee compensation. There is no way to separate the factual context of Godfrey's claim from the constitutional question it poses.

To illustrate this point, consider how this case would look if Godfrey's claim was factually far different. Imagine that instead of lowering his salary the Governor, peeved at Godfrey's performance or refusal to quit, ordered state troopers to conduct a warrantless raid at Godfrey's house. During the raid the troopers damage his front door, hold

everyone at gunpoint, and pilfer through Godfrey's personal possessions.

If such thing were to happen Godfrey might claim that his remedies under the Iowa Tort Claims Act or common law claims for trespass, battery, and assault are inadequate. Such a case would squarely present the question of whether the Iowa Constitution's guarantee against unreasonable searches and seizures gives rise to a private cause of action – even without enabling legislation under Article XII, § 1. *But it would raise no other issue of broad public concern.*

The day after Godfrey won that appeal, Iowa's county attorneys would give their clients simple advice: no warrantless raids. Of course, we already know to tell our clients that. And this is the difference with Godfrey's actual claim. The Governor and his staff are being sued for a due process violation for doing something that the law expressly says the Governor can do. Unlike our hypothetical warrantless raid (which anyone would concede to be a violation of the law)

Godfrey's request for this Court to recognize a due process cause of action is inexorably tied to a determination that what happened to him actually violates due process.

This Court has jealously guarded its ability to interpret the Iowa Constitution under a different analytical framework or in a different manner than similar provisions in the U.S. Constitution. *State v. Pals*, 805 N.W.2d 767, 771—72, 781—83 (Iowa 2011). The case may come which appropriately presents the question of whether an implied cause of action exists under the Iowa Constitution. But this is not the case.

Recognizing Godfrey's claim under these facts would do far more harm than good. "What is required under the Iowa constitution, in each and every case that comes before us, is not mere identification of a potentially analogous federal precedent, but exercise of our best, independent judgment of the proper parameters of state constitutional commands" *State v. Short*, 851 N.W.2d 474, 490 (Iowa 2014). This Court should not interpose a due process claim between every governmental employer and employee to give Godfrey what he already has: a full and fair opportunity to persuade an Iowa jury that he has

been wronged. His lack of a legitimate property interest in the maximum salary for his position causes his claim to fail before it needs any further consideration.

B. A* Bivens *claim under the U.S. Constitution will not be recognized where there is an alternative existing process to protect an interest or where special factors counsel hesitation to recognize a remedy. Godfrey has alternative remedies available to him and his claim invokes profound special factors which counsel hesitation. Has Godfrey established that a* Bivens*-style remedy should be recognized under the Iowa Constitution?

Godfrey asks this Court to follow the lead of the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). His brief fails to address the substantial limitations placed on *Bivens* by the U.S. Supreme Court in subsequent decisions. These limitations should be fully explored.

The *Bivens* holding has not been extended by the U.S. Supreme Court since 1980. Martin A. Schwarz, *Section 1983*

Litigation 8 (3d ed. 2014). In a series of decisions starting in 1983 the Court has consistently refused to extend the doctrine and has imposed significant limitations on the availability of *Bivens* liability. *Id.* at 8-9 (collecting cases). Indeed, recent developments in case law strongly undercut Godfrey's reliance on *Bivens* as a guidepost for this Court.

In *Minneci v. Pollard*, 132 S.Ct. 617 (2012) the Court considered the claim of a prisoner against employees of a private company that operated a federal prison. Pollard claimed he had been deprived of adequate medical care in violation of the Eighth Amendment's prohibition against cruel and unusual punishments. *Id.* at 620. The Court described a two-step approach when faced with a request to extend *Bivens*. First, the Court would consider, "whether any alternative, existing process for protecting the [constitutionally recognized] interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 621. Second, whether, even in the absence of an alternative remedy, there were

"special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.*

The Court found that such an alternative existed because Pollard's, "claim focuses upon a kind of conduct that typically falls within the scope of traditional state tort law. And in the case of a privately employed defendant, state tort law provides an 'alternative, existing process' capable of protecting the constitutional interests at stake." *Id.* at 623. The existence of this alternative was found by the Court to be a "convincing reason" to refrain from creating a new and freestanding remedy. *Id.*

Godfrey makes much of the supposed inadequacy of his tort claims. (Brief 46-55). Yet this very argument was rejected by the *Minneci* Court. "State-law remedies and a potential *Bivens* remedy need not be perfectly congruent…*Bivens* actions, even if more generous to plaintiffs in some respects, may be less generous in others." *Id.* at 625. The Court focused on the alternative's probable effects to find it sufficient, "the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply

with the Eighth Amendment while also providing roughly similar compensation to victims of violations." *Id.*

Godfrey utterly fails to engage on this point. Godfrey's claim that his other remedies are inadequate is limited to the assertion that, "Because the [Iowa Civil Rights Act] does not address discrimination based on partisan politics, it neither offers him a remedy nor can it be used to preclude Plaintiff from seeking relief for such a violation." (Brief 53). One would think that Godfrey would have included a citation to authority for the surprising proposition that "partisan politics" is the basis for a constitutional cause of action under *Bivens*. His "partisan politics" claim triggers the second *Minneci* factor and should counsel hesitation to recognize a remedy.

Again, it is in the details of Godfrey's case where ICAA's interest as amicus curiae may be found. The recognition of a *Bivens*-style remedy for "partisan politics" is an issue of grave importance. Such a cause of action would substantially alter the nature of public employment and the right of governmental officers to execute their authority in a democratic society. His claim should be scrutinized because, as with his claim of a

property interest in his salary, the nature of his claim cannot readily be separated from the threshold question of whether he has even asserted a valid constitutional claim.

Godfrey's petition on this point is factually sparse. He claims that he refused to resign because, in part, his position was intended to be non-partisan. (Third Amended Petition ¶¶ 38, 46). This is a dubious proposition. Unlike numerous other departmental heads[3], there is no prohibition in the statute from considering political affiliation in the selection of the workers' compensation commissioner. Although the commissioner may not be involved in political activity while in

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[3] Department of administrative services (Iowa Code § 8A.102(2)); telecommunications and technology commission (Iowa Code § 8D.4); finance authority (Iowa Code § 16.6); department of public safety (Iowa Code § 80.2); drug policy coordinator (Iowa Code § 80E.1); public employee retirement system (Iowa Code § 97B.3); department of human services (Iowa Code § 217.5); and department of corrections (Iowa Code § 904.107).

office (Iowa Code § 86.4), this is hardly the same as a prohibition on the consideration of politics in who holds the office.

Notably, Godfrey does not make any factual allegation that any action by the Governor or his staff was done for partisan purposes. Godfrey concludes that it was done for this reason, but alleges no facts to support this claim. He fails to even allege that he is of a different political party than the Governor or that he publicly failed to support the Governor's election – both hallmarks of a typical political retaliation claim.

But, suppose the Governor did what he did for partisan political purposes. Does this mean the constitution was violated? Godfrey was a department head. To be sure, a department head with a six-year term, but a department head nonetheless. "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990).

The same constitution which Godfrey invokes places in the governor "[t]he supreme executive power of the state," and grants the governor the power and duty to, "take care that the laws are faithfully executed." Iowa Const., Art. IV, §§ 1 and 8. The law recognizes the governor must be able to make high-level personnel choices, "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod v. Burns*, 427 U.S. 347, 367 (1976). Because of this, political considerations may justify the dismissal of high-level policymaking employees. *Id.*

There can be no serious claim that Godfrey is not a policymaker. In his petition he calls his position quasi-judicial. (Third Amended Petition ¶¶ 46 and 179). Yet, judges are policymakers. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990) (considering exception for appointees on the policymaking level under the Age Discrimination in Employment Act). A particular employee's status as a policymaker is a question

which may be determined as a matter of law. *Bauer v. Bosley*, 802 F.2d 1058, 1062 (8th Cir. 1986).

The workers' compensation commissioner decides all appeals of decisions of his deputies. Iowa Code § 86.24. In addition, he supervises the department's employees, is responsible for his departmental budget, must report to the governor regarding his department's affairs, and, through the efficiency or lack thereof of his department, impacts the labor market in the State of Iowa. Iowa Code §§ 86.8 and .9 (duties of commissioner); Iowa Code § 7A.1 (reports to governor); Iowa Code § 8.23 (departmental budget process); Evangelos M. Falaris, et al, *Workers' Compensation and Market Efficiency* (W.E. Upjohn Institute for Employment Research 1995) (discussing impact of workers' compensation system on efficiency of labor markets).

The code specifically requires the commissioner to be an Iowa lawyer. Iowa Code § 86.1. "[I]t is doubtless true that a wide array of government attorneys are policymaking employees." *Latham v. Office of the AG*, 395 F.3d 261, 268 (6th Cir. 2005). Policymakers are those who must have,

"meaningful input into governmental decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Kline v. Hughes*, 131 F.3d 708, 709 (7th Cir. 1997).

Although "no clear line can be drawn between policymaking and nonpolicymaking positions," *Elrod*, 427 U.S. at 367, the Sixth Circuit has held that at least four categories of employees are considered policymakers:

> Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
>
> Category Two: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;
>
> Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors; and

> Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

Latham, 395 F.3d at 267. Under *Latham*, Godfrey is a "category one" type of policymaker. He is in a position created by statute and is tasked with enforcing the workers' compensation law through the agency he controls. His policymaker status therefore makes it perfectly legal for the Governor to have sought his resignation and, when Godfrey refused, to reduce his compensation – even for political reasons.

The Governor is hardly the only elected official in the state who must make decisions about policymakers in government. If Godfrey wins on his legal theory may an elected sheriff replace his chief deputy without fear of litigation? *See*, Iowa Code § 341A.7(1) (excluding chief deputies from civil service protection). What about a county attorney's assistants? *See*, Iowa Code § 331.758(2) (authorizing the appointment of deputies, clerks, and assistants subject to board of supervisors approval). May a newly-elected school board

replace the superintendent of the schools at the end of her contract? *See*, Iowa Code § 279.20 (authorizing the board of directors of a school district to appoint a superintendent of schools).

Godfrey's legal theory raises significant separation-of-powers and political-question concerns. He essentially asks this Court, in the guise of a constitutional claim, to supervise how the Governor executes his office. Yet this is not suited to judicial resolution. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the General Assembly] or the confines of the Executive Branch." *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012).

The framers of the Iowa Constitution expressly protected the doctrine of separation of powers:

> The powers of the government of Iowa shall be divided into three separate departments--the legislative, the executive, and the judicial--and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

Iowa Const., Art. III, § 1. The framers understood, "[t]here is no liberty if the power of judging be not separated from the legislative and executive…were [the judicial power] joined to the executive power, the judge might behave with violence and oppression." *In the Interest of D.C.V.*, 569 N.W.2d 489, 495 (Iowa 1997) (quoting Charles Louis de Secondat, Baron de Montesquieu, *The Complete Works of M. de Montesquieu* (London: T. Evans, 1777), 4 vols. Vol. 1, The Spirit of Laws, Book XI, Chapter VI, "Of the Constitution of England.")[4]

This Court has recently explained in the context of its prudential standing doctrine:

> This ultimate power to decide disputes between the other branches of government and to determine the constitutionality of the acts of the other branches of government does not exist as a form of judicial superiority, but is a delicate and essential judicial responsibility found at the heart of our superior form of government. We have the greatest respect for the other two branches of government and exercise our power with the greatest of caution.

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[4] The quote in *In the Interest of D.C.V.* has a minor difference in the translation from the original French as contained in Evans's volume.

Godfrey v. State, 752 N.W.2d 413, 425 (Iowa 2008). This sense of caution should cause this Court to reject Godfrey's claim.

There is no question that this Court has the duty and power to adjudicate disputes properly before it. This is not what Godfrey asks, however. He bases his lawsuit on a salary decision that the Governor is expressly permitted by law to make and claims that it is illegal because of "partisan politics." There is no pretense of an actual constitutional violation. One might fairly look at Godfrey's petition and say, "so what?" And, as with Godfrey's claim of deprivation of property, the recognition of his cause of action under these circumstances would be tantamount to a determination that "partisan politics" is a proper subject for judicial remedy. It plainly is not.

Minneci teaches that *Bivens* will not be extended where there are suitable alternative remedies or where special factors counsel hesitation. Godfrey's *Bivens* argument begs the question. He claims he needs it because he cannot sue for partisan politics under the Iowa Civil Rights Act. Yet, where

else can he? Remember, the alternative remedies must be *suitable*.

Let us consider another hypothetical. During the pendency of this case the Governor was nominated by his party for reelection. By law his political party, at his suggestion, nominated a candidate for Lieutenant Governor to run on a ticket with him. Iowa Const., Art. IV, § 3. The Governor, as we all probably know, did not pick Godfrey to run on his ticket. Suppose Godfrey thinks his exclusion was for "partisan politics." Suppose also we all agree that the Iowa Civil Rights Act does not provide a cause of action or remedy for his non-selection as a nominee for Lieutenant Governor. Does this mean that he *must* therefore have a claim under the Iowa Constitution? Could this Court only decide the question of whether the constitution is self-executing without also passing on the threshold question of whether what is claimed to be unconstitutional actually is so?

Obviously not. If all Godfrey can say is "partisan politics" then he is nowhere close to establishing a constitutional violation in the first place. His *Bivens* claim should be rejected.

II. Article I, § 6 of the Iowa Constitution only constrains actions by the general assembly. Godfrey invokes it against the governor and other executive branch officials. Has Godfrey established a valid constitutional claim?

As with the due process claim ICAA expects that the defendants will advance arguments that the Iowa Constitution is not self-executing. In addition, the constitutional provision cited by Godfrey does not textually support his claim.

Preservation of error.

ICAA agrees that Godfrey has preserved error on a claim as to whether there is an implied cause of action under Art. I, § 6 of the Iowa Constitution. He has not preserved error under any other constitutional provision or theory.

Scope of Review.

The Iowa Supreme Court reviews constitutional claims de novo. *Hensler*, 790 N.W.2d at 578.

A. The text of Iowa Const. Art. I, § 6 does not support Godfrey's claim.

Godfrey's equal protection claims are made against the State of Iowa (Count VIII) and the individual defendants (Count IX). (Third Amended Petition 18-19) In essence he claims that he was treated in a discriminatory manner based upon sexual orientation. In support of these two counts he cites to Art. I, § 6 of the Iowa Constitution. Yet this text will not bear the weight placed on it by Godfrey, "All laws of a general nature shall have a uniform operation; **the general assembly** shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const., Art. I, § 6 (emphasis added).

"The general assembly." This provision of the Iowa Constitution says nothing about the governor or executive branch officials at all. The cases interpreting this provision have addressed policy choices made by the legislature, not by the executive. See, e.g., *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004) (gambling tax rates); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (statutory prohibition against same-sex marriage); *Doe v. New London*

Cmty. Sch. Dist., 848 N.W.2d 347 (Iowa 2014) (statute of limitations for municipal tort claims). In fact, the case law is devoid of decisions applying Art. I, § 6 to the actions of executive officials.

"Legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 568 (Iowa 2011). "Constitutional provisions are construed under the same general principles which govern statutory construction, with due regard for the different purposes they serve." *Redmond v. Carter*, 247 N.W.2d 268, 275 (Iowa 1976) (LeGrand, J. concurring).

If the use of the term "general assembly" in Art. I, § 6 means "general assembly and governor" then, respectfully, the drafters of the Iowa Constitution did not use the English language in an intelligible manner. This Court's separation-of-powers jurisprudence is meaningless. In fact, this Court's item veto jurisprudence is meaningless. *Compare*, *Rants v. Vilsack*, 684 N.W.2d 193, 201-02 (Iowa 2004) (analyzing executive and legislative powers in the appropriations process).

That is not to say that the Governor and his staff are free to discriminate on the basis of sexual orientation. Of course they are not. But the basis for a cause of action would be under the Iowa Civil Rights Act or an action arising under the Fourteenth Amendment. The provision of the Iowa Constitution cited by Godfrey simply does not apply to this case.

Again, this is where ICAA's interest as amicus curiae is found. Hopefully there is little need to belabor the point. Godfrey's legal theory, if recognized, creates an utterly new basis of liability for executive branch officials in the performance of their duties. His claim should be rejected.

One other possible argument – not made by Godfrey – should be addressed. Article I, § 1 of the Iowa Constitution contains the statement of political principles, "[a]ll men and women are, by nature, free and equal, and have certain inalienable rights – among these are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

It is an open question just how much "constitutional bite" this clause has. *Jacobsma*, 862 N.W.2d at 351. Yet, in the context of the infringement of liberty or property rights by legislation, "our inalienable rights cases have held that…the rights guaranteed by the provision are subject to reasonable regulation by the state in the exercise of its police power." *Id.* at 352. "This formulation, of course, is virtually identical to the rational-basis due process test or equal protection tests under the Federal Constitution." *Id.* It is difficult to discern from this sparse body of law how a constitutional theory of liability helpful to Godfrey could be culled from it. Yet, in any event, Godfrey has not made this claim.

Conclusion

ICAA does not file this brief seeking to deny Godfrey his day in court on his other claims. He should get that. But there is no justification to create startling new theories of liability for governmental officials. This Court should decide in another case whether there is an independent cause of action under the Iowa Constitution.

Respectfully submitted,

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